IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12059 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SANJAY @ MAHADEV S/O TULSIRAM ALIAS BASKARBHAI ALIAS

Versus

COMMISSIONER OF POLICE

Appearance:

MS BANNA DATTA for Petitioner

MR ND GOHIL, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 09/05/2001

ORAL JUDGEMENT

#. Heard the learned advocate Ms. Banna Datta on behalf of the petitioner and the learned AGP Mr.N.D.Gohil for the respondent - State.

#. In the present petition, the petitioner has challenged the order of detention dated 7.11.2000 passed by the Police Commissioner, Ahmedabad City. The petitioner has been initially detained in Bhuj Jail and thereafter transferred at Bhavnagar Jail. The respondent State has filed the detailed affidavit-in-reply which has been taken on record. In all, four offences have been registered under the provisions of sections 66(1)B, 65A,E, 81, 83, 116(1)B of the Bombay Prohibition Act and the last offence has been registered against the present petitioner on 2.11.2000. The petitioner was in judicial custody at the time when the detention order was passed. The last offence was registered vide No.1902/2000 on 2.11.2000. Therefore, at the time of passing the detention order the petitioner was in judicial custody as reflected from the grounds of detention at page 26.

#. The learned advocate Ms.Datta has raised the contention challenging the detention order that at the time of passing the detention order the petitioner was in judicial custody and the detaining authority has not considered the cogent material whether any bail application has been filed by the petitioner for releasing him on bail and in absence of such cogent material merely likelihood of releasing the petitioner from the custody amounts to nonapplication of mind and it also amounts to unjustified subjective satisfaction of the detaining authority.

She also submitted that the last offence has been registered on 2.11.2000 against the present petitioner and immediately on 7.11.2000 the detention order has been passed and that is hurriedly without application of mind.

She also submitted that the statements of the concerned witnesses whose identity has been put in secret have been recorded on 1.11.2000 by the concerned Police Sub Inspector, PCB, Ahmedabad City and the said statements have been verified by the detaining authority on 6.11.2000 and the second statement of the witness recorded on 2.11.2000 which has been verified by the detaining authority on 6.11.2000, and therefore, according to the learned advocate Ms.Datta that on the next day after verification of such statements by the detaining authority on 7.11.2000 the detention order has been passed, and therefore, she also relied upon the decision of this Court reported in 2000(3) GLR 2696 in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) Vs. State of Gujarat.

#. The learned AGP Mr.N.D.Gohil appearing on behalf of

the respondent - State has submitted that the detail affidavit-in-reply has been filed by the Detaining Authority and the order of detention has been passed after full application of mind and after recording subjective satisfaction and there is no nonapplication of mind as well as the detention order has not been passed in a mechanical manner.

#. Considering two contentions, one is that at the time of passing the order of detention the petitioner was in judicial custody and at that time there was no cogent material available with the detaining authority which justifies the release of the present petitioner from the custody. No application for bail has been filed by the petitioner before the competent Court, and therefore, likelihood which has been presumed by the detaining authority is without any cogent material, and therefore, considering the view taken by the Apex Court in the decisions reported in 1985 SCC (Criminal) 514 and (2001)1 SCC 341 the Apex Court has observed that while passing the detention order, subjective satisfaction of the detaining authority must have to be established from the record. When the detenu already in jail then the detaining authority must be satisfied on the best available cogent material about the likelihood of detenu being released on bail and not merely about likelihood of his leaving the application for bail. In absence of such satisfaction the detention order cannot be sustained. Considering the observations of the Apex Court in the present case also and considering the grounds of detention, there is no cogent material available with the detaining authority about the release of the present petitioner as there was no application filed by the petitioner before the competent Court for releasing him from the custody. So in absence of such cogent material, subjective satisfaction is not established. Second contention about recording statements by the concerned Police Sub Inspector on 1.11.2000 and 2.11.2000 of two witnesses which were verified by the detaining authority on 6.11.2000 and thereafter in a mechanical manner on the next day i.e. on 7.11.2000 the detention order has been passed by the detaining authority. This contention has been squarely covered by the above referred case reported in 2000(3) GLR 2696 wherein similar situation was arose and the same contention was raised and ultimately on that ground the detention order has been quashed and set aside by this Court. The following relevant observations of this Court reported in 2000(3) GLR, 2696 are as under :-

"After referring to Kalidas C.Kahar Vs. State of Gujarat, 1993 (2) GLR 1659 the Court observed :

The statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August 1999, 21st August 1999 and 25th August 1999 with regard to the incidents dated 10th July 1999, 13th June 1999 and 26th June 1999 were the material along with the proposal which is said to have been made on 27th August 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August 1999 at any time prior to 29th August 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e., on 30th August 1999 the detention order has been passed.

The manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Sec. 9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Sec. 9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power under Sec. 9(2) and it is established that in such cases, the wrong exercise of power under section 9(2) adversely affects the detenu's right of making an effective representation guaranteed under Article 22(5) of the Constitution of India.

Once the materials are placed before the detaining authority with the proposal by the

> sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under section 9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August 1999, i.e., on the next day to the date on which the materials were considered by the detaining authority."

#. I have considered the two decisions of the Apex Court and also considering the above referred decision of this Court, according to my opinion the detention order is vitiated and the same is required to be quashed and set aside.

#. In the result, the petition succeeds and the same is allowed. The order of detention dated 7.11.2000 is vitiated and resulted to quash and set aside. The detenu - Sanjay @ Mahadev s/o Tulsiram @ Bhaskarbhai @ Ukaliram Sidam (Marathi) who has been detained at Surat Jail be set as liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

(H.K.Rathod,J)
(pathan)